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Federal Communications Commission
Office of the Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

ORIGINAL

In the Matter of	)	
	)	
Tariff Filing Requirements for Interstate Common Carriers	)	CC Docket No. 92-13

REPLY COMMENTS OF AD HOC TELECOMMUNICATIONS USERS COMMITTEE

The Ad Hoc Telecommunications Users Committee (Committee) hereby submits its reply comments in response to the Notice of Proposed Rulemaking (NPRM) released by the Commission on January 28, 1992, in the above-captioned proceeding.

I. INTRODUCTION

This rulemaking presents the Commission with a clear choice: to use every means within its power under the Communications Act to preserve and maintain the competitive marketplace that has arisen in the interexchange arena, or to retreat from the policies that have brought about that marketplace. Not surprisingly, only AT&T and a handful of other dominant carriers favor the second choice. The rest of the marketplace is overwhelming in its support for mechanisms to keep in place -- and even improve -- the regulatory status quo. By far the majority of commenters go out of their way to present thorough and compelling legal analyses to demonstrate the lawfulness of the Commission's

application of the forbearance policy to nondominant carriers. They also testify uniformly to the competitive benefits that have arisen directly from the Commission's deregulation of nondominant carriers in general and from forbearance in particular.[1]

The primary proponent of the notion that forbearance violates the Communications Act is, unsurprisingly, AT&T. After several years of vigorous competition have eroded its market power, AT&T's interests are best served by a regulatory regime which requires the posting of all prices for all transactions so that AT&T may act more effectively as a price leader. But such a regime would not serve consumers, because it would dilute the intensity of the price and service competition that have made the marketplace what it is today. The position blithely characterized by AT&T as based on "pure questions of law" would in fact have an inescapable and dramatic real world impact on the marketplace. To ignore this impact, as AT&T suggests, would be the real error. The authorities

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[1] These commenters include: International Communications Association (ICA); First Financial Management Corporation (First Financial); GTE Service Corporation (GTE); Pacific Telesis Group (PacTel); Southwestern Bell Corporation (Southwestern Bell); MCI Telecommunications Corporation (MCI); Sprint Communications Company L.P.; Competitive Telecommunications Association (CompTel); Williams Telecommunications Group, Inc. (Williams); Metropolitan Fiber Systems, Inc. (MFS); International Business Machines Corporation (IBM); Local Area Telecommunications, Inc. (LOCATE); RCI Long Distance, Inc.; Cellular Telecommunications Industry Association (CTIA); Commonwealth Long Distance Company; Automated Communications, Inc., Business Telecom, Inc., and U.S. Long Distance, Inc., filing jointly; KIN Network Access Division; OCOM Corporation; Telecommunications Marketing Association; Interexchange Resellers Association (IRA); General Communication, Inc.; and ACC Long Distance Corp.

cited by AT&T are readily distinguishable from the situation at hand, and whatever uncertainty AT&T might otherwise have created by its reliance on them is completely dispelled by Congress's clear ratification of the Commission's interpretation of its powers under the Communications Act.

There are few others who agree with AT&T's assessment of the lawfulness of forbearance. Notably, all who oppose forbearance are dominant carriers -- yet not all dominant carriers oppose forbearance. Some -- PacTel, Southwestern Bell and GTE -- argue that forbearance is lawful, although they go further and argue that some of their own services should be subjected to forbearance. The Committee strongly opposes the extension of forbearance to any LEC services, since the bedrock policy foundation for such a regulatory approach -- effective competition -- is utterly absent for such services. The Commission has not proposed, and we trust will not adopt in this proceeding, forbearance for any LEC services.[2] Nevertheless, although these carriers' claims for the applicability of forbearance to their own services are both procedurally out of order and substantively wildly exaggerated, their fundamental argument that

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[2] All arguments in support of the permissibility of the forbearance approach under the Communications Act rely vitally on the Commission's care in extending forbearance only to those carriers and, in the case of AT&T, services as to which the existence of effective competition has been clearly and convincingly -- indeed, overwhelmingly -- shown. Any attempt to extend forbearance to areas in which clear and overwhelming market power remains, including all LEC services, would be an abuse of the Commission's discretion and well beyond its forbearance power. LEC arguments that the Commission should extend forbearance to some of their services are patently overreaching and should be summarily rejected by the Commission.

the Commission has the power to forbear *in appropriate circumstances* remains sound.

To bolster this argument further, a number of commenters have suggested ways to implement forbearance to maximize its pro-competitive impact, many of which coincide with or supplement Committee recommendations to the same end. Some have pointed out that nondominant carriers' contracts cannot serve fully their intended function in the marketplace unless carriers are prohibited from misusing the tariffing process to undercut their enforceability; these commenters have proposed mechanisms for assuring that such misuse does not happen. *See, e.g.,* TCA Comments at 3-10; Committee Comments at 20-25. Others have noted the implicit ability under existing rules of nondominant carriers to move some portion of their services to private carriage, thereby eliminating any question whether some minimum level of common carriage regulation should apply. *See, e.g.,* IBM Comments at 13-14; First Financial Comments at 12-13; Committee Comments at 25-31. Still others have focused on various "niche" carriers, to which additional grounds for forbearance apply, and for which additional sources of Commission forbearance power exist. *See, e.g.,* OCOM Comments at 31-32; IRA Comments at 1-2; Committee Comments at 13-18. All of these commenters' submissions are worthy of careful consideration and, in almost all cases, adoption, by the Commission. Moreover, none of what AT&T has argued negates in any way either the legal soundness or the policy benefits of these parties' approaches.

II. DESPITE AT&T'S AND OTHER DOMINANT CARRIERS' ASSERTIONS, FORBEARANCE IS PLAINLY LAWFUL, AND ABOLISHING IT WOULD BE A CLEARLY UNWARRANTED RETREAT FROM PROVEN, PRO-COMPETITIVE POLICIES

AT&T argues bluntly that policy considerations are irrelevant to the Commission's deliberations herein and that those deliberations boil down to "pure questions of law." AT&T Comments at 1. According to AT&T, these pure questions of law are conclusively determined by the Supreme Court's decision in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 110 S.Ct. 2759 (1990) (*Maislin*), and the Court of Appeals' decision in *MCI Telecommunications Corporation v. FCC*, 765 F.2d 1191 (D.C. Cir. 1985) (*MCI v. FCC*). AT&T Comments, *passim*. AT&T's absolute reliance on these cases, while perhaps admirable in its straightforwardness, suffers from one flaw from AT&T's point of view: if it is wrong about what those cases mean -- either taken on their own or in light of Congress's passage and the President's signing of the Telephone Operator Consumer Services Improvement Act of 1990 (TOCSIA) -- then its position collapses utterly. AT&T has made no policy arguments of any kind against forbearance. If AT&T is wrong that forbearance is absolutely unlawful, then the Commission should summarily reject its call for the repeal of forbearance.[3]

And in point of fact, AT&T *is* wrong. Its errors -- which were, given the history of AT&T's positions in related proceedings, quite foreseeable -- have

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[3] The other champions of the repeal of forbearance -- NYNEX, US West and Alascom, most prominently -- similarly rely on a purely legal argument based on these two cases, and their positions should be rejected on the same basis.

already been identified and debunked at length in the Committee's initial comments in this proceeding. As the Committee showed (Comments at 8-10):

> [T]he cases do not support a rollback from forbearance. *Maislin*, first of all, does not even purport to address forbearance, for the Interstate Commerce Commission (ICC) had not, in that case, established a forbearance policy. Instead, while *leaving in place* the tariffing regime for motor carriers, the ICC had established a policy prohibiting as an unreasonable practice the charging of the tariffed rates in instances in which the carrier had negotiated a different rate directly with the shipper. It was this contradiction that the Supreme Court highlighted as beyond the ICC's power, since tariffs mandatorily filed establish, by law, the lawful rate for the services to which they apply. The ICC had *not* excused the carrier from filing tariffs -- and in particular had not relied on its power to modify tariffing requirements themselves under 49 U.S.C. § 10762(d)(1).[4] Thus, the Court did not address, even in passing, the lawfulness of a forbearance policy. It held only that, not having forborne from requiring carriers from filing tariffs, the ICC could not, as a blanket matter, declare that to collect tariff rates instead of contract rates was an unreasonable practice.
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> *MCI v. FCC* might at first glance appear more troubling. In that case the Court of Appeals overturned the *Sixth Report and Order* in *Competitive Common Carrier*, in which the Commission had gone beyond forbearance to adopt rules which would require nondominant carriers both to cancel their tariffs then on file and to refrain from filing tariffs in the future. In that case, the Court expressly stated that it was *not* reaching the question of whether forbearance itself was within the Commission's power (765 F.2d at 1196) and indeed noted that the move from forbearance to forbiddance "fundamentally altered" the regulatory regime (765 F.2d at 1190). Any references in the case to forbearance as such are therefore mere dicta and any assertion that *MCI v. FCC* controls the instant proceeding is wrong as a straightforward matter of law.

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[4] Indeed, the ICC had expressly held that the carrier's failure to file a tariff containing an individually negotiated rate was an unreasonable practice. *Maislin*, 110 S. Ct. at 2764. And as OCOM points out (Comments at 20-21), the ICC's power to modify tariffing requirements is in any event narrower on its face than this Commission's.

> This is not to deny the Commission's need to examine the Court's reasoning in *MCI v. FCC* to determine whether it sheds any light on the scope of the Commission's authority. But the Commission should refrain from assuming that sweeping pronouncements by the Court are literally applicable to the forbearance scenario. Such a course would not only be incautious but would be an abdication of the Commission's duty to exercise its own independent expert judgment about the meaning of the statute it is called upon to administer. Thus, the inevitable reliance by AT&T on Court language such as "'Shall,' the Supreme Court has stated, 'is the language of command'" cannot simply be accepted at face value but must be assessed by the Commission in relation to its uncontested power to modify tariffing requirements under certain circumstances, and in relation to other sources of authoritative guidance on how the Act is to be interpreted; indeed, the Court in *MCI v. FCC* expressly recognized that "'Shall' . . . 'is the language of command'" does not hold true in the face of "a clearly expressed legislative intention to the contrary." 765 F.2d at 1191, *quoting CPSC v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

Nothing in AT&T's comments casts the slightest doubt on this analysis. Indeed, AT&T's argument proceeds precisely as anticipated -- and refuted -- in the Committee's initial comments. Most notable in AT&T's submission is its utter failure to grapple with the final above-quoted words of the District of Columbia Circuit in *MCI v. FCC*, warning that reliance on the supposed mandatory meaning of the word "shall" is not appropriate where there is "a clearly expressed legislative intention to the contrary."

By sliding past this language, AT&T has tried to avoid the difficult task of dealing with Congress's passage, and the President's signing, of TOCSIA -- despite the Commission's express request that commenting parties discuss TOCSIA's impact on its deliberations herein. NPRM at paras 7-8. By contrast to AT&T's reticence, the Committee and many other parties did discuss the impact

of TOCSIA,[5] and their analyses make clear that TOCSIA clearly recognizes the Commission's general forbearance power, since to conclude otherwise is to conclude that Congress intended that OSPs be subject to *fewer* tariffing requirements than other carriers -- an evident absurdity given that Congress passed TOCSIA to address specifically identified abuses by some OSPs.

The narrowness of AT&T's attack has other important implications. First, even if AT&T's exclusive reliance on *Maislin* and *MCI v. FCC* were otherwise valid in its assault on complete forbearance for all nondominant carrier offerings, it would not negate the Committee's demonstration that (a) the Commission's power to make exceptions to tariffing requirements under Section 203(b) of the Act certainly extends to forbearing from requiring resellers to tariff their common carrier offerings; and (b) the Commission also has the power to forbear from requiring nondominant carriers to tariff their custom service packages even if they file tariffs for generic offerings. *See* Committee Comments

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5 *See, e.g.,* Committee Comments at 10-13 and the comments of MCI at 25-45; Sprint at 11-14; CompTel at 9-14; ICA at 4-5; CTIA at 14-17; WilTel at 2-6. Unlike AT&T, these parties did discuss the legal authorities cited by the FCC as arguably adverse to their position (*Maislin* and *MCI v. FCC*), thereby giving AT&T a fair opportunity to respond. AT&T has not provided the Commission or other parties with the benefit of its views of the effect of TOCSIA, thereby depriving parties of the chance to respond to those views in the reply round. Assuming AT&T decides to address TOCSIA on reply, this will force other parties to the additional expense of making ex parte filings to respond to AT&T's position, and will force the Commission to review a de facto third round of filings. Alternatively, the Commission ought to treat AT&T's failure to address TOCSIA -- in the face of a clear Commission request that parties do so -- as an admission that TOCSIA does indeed ratify the Commission's forbearance powers.

at 13-18. Second, as the Committee and several other parties pointed out, existing rules permit nondominant carriers to offer some portion of their service as private carriage rather than as common carriage. Even the most exaggerated reading of *Maislin* and *MCI v. FCC* cannot conceal the fact that the holdings in those cases apply to common carriage only and have no effect whatever on carriers' ability to offer private carriage, which by definition is not subject to the tariffing provisions of Title II of the Communications Act.

In short, AT&T's position in this proceeding (and those of its fellow dominant carriers who oppose forbearance) boils down to the simple proposition that two court cases -- neither of which directly addresses the question and one of which has been known to AT&T for seven years -- require the Commission to undo a policy that has been an unquestioned regulatory success for a decade. AT&T's position, even if taken at face value, does not reduce the Commission's power to forbear from requiring the tariffing of resale common carriage or custom offerings. Nor does it affect in any way the ability of nondominant carriers under the Act and the Commission's rules to provide private carriage. But most fundamentally, when properly analyzed, the authorities cited by AT&T simply do not limit the Commission's power to maintain forbearance intact.

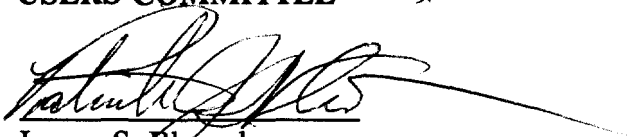
III. CONCLUSION

The burden of proof in this proceeding clearly lies on AT&T and the handful of other commenters who oppose the continuation of the Commission's long-standing forbearance policy. They have failed to carry their

burden. The Commission should put an end to the unfortunate chapter of uncertainty created by AT&T's actions in this and its complaint proceedings by resoundingly and unequivocally maintaining forbearance in place.

Respectfully submitted,

AD HOC TELECOMMUNICATIONS USERS COMMITTEE

By: 

James S. Blaszak
Patrick J. Whittle
Gardner, Carton & Douglas
1301 K Street, N.W.
Suite 900 East
Washington, D.C. 20005

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Its Attorneys